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Moez Ali bin Akbarally & Anor v Public Bank Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-04(IM)-114–03 OF 2020
KAMALUDIN MD SAID, HAS ZANAH MEHAT AND AHMAD NASFY JJCA
17 JUNE 2021

C

Civil Procedure — Judgments and orders — Enforcement — Whether leave for bankruptcy proceeding remains valid notwithstanding bankruptcy notice set aside — Whether fresh leave must be obtained — Whether bankruptcy proceedings was an execution of judgment — Order 46 of the Rules of Court 2012

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The respondent had obtained leave to sign a summary judgment ('the judgment') against the appellants under O 26A of the then Rules of the Subordinate Court 1980 on 11 April 2007. No execution proceedings were taken on the judgment. The respondent then obtained leave to execute the
E judgment on 2 October 2015 ('first order for leave'). Upon obtaining the first order for leave, the respondent proceeded with separate bankruptcy notices ('BN') and thereafter, the creditor's petitions against the appellants. The appellants then filed applications to set aside the BN and creditor's petitions but the applications were dismissed by the senior assistant registrar. The
F appellants then filed their respective appeals to the High Court. The appeals were again dismissed. Dissatisfied, the appellants appealed to the Court of Appeal where the appeal was allowed and the BN were set aside. The respondent then on 31 October 2018 filed a fresh application for leave to execute the judgment and/or for bankruptcy proceedings against the appellants
G after six years pursuant to O 46 and/or O 92 r 4 of the Rules of Court 2012 ('the ROC'). The learned session court judge allowed the respondent's leave application ('second order for leave'). The appellants then appealed to the High Court against the second order for leave but their appeal was dismissed. Hence the appeal to the Court of Appeal. The appellants contend that the second
H order for leave should not have been granted on the basis that no execution on the judgment was made by the respondent as no writ of execution was issued in relation to the judgment pursuant to O 46 of the ROC and that the issuance of a BN was not a form of execution. The issues for consideration were: (a) whether the respondent may rely upon the first order for leave to commence
I fresh bankruptcy proceedings; and (b) whether the respondent had failed to take any form of execution on the judgment in the mode of execution referred to in O 46 of the ROC.

Held, dismissing the appeal with no order as to costs:

(1) In short, it was not true to say that the respondent had not taken any action upon the first order for leave being given. In actual fact the respondent's attempt to execute the judgment was not successful. Since the judgment was still valid, the respondent was obviously entitled to execute the judgment as limitation for execution had not set in (see para 26).

(2) Upon carefully scrutinising the appeal record, the court found that the learned sessions court judge had properly exercised the discretion and correctly made the second order for leave and that the High Court was correct in not disturbing the exercise of that discretion. The court found merit in the respondent's submission that the respondent only needed to show the court sufficient reasons in support of the application to explain the delay in proceedings with the execution and/or bankruptcy proceedings against the appellants. As long as the applicant for leave provided some plausible reasons in support for leave to execute after a lapse of six years then leave ought to be given, after all a judgment could not be defeated unless it was time barred (see paras 30–31).

(3) It was clear that although a bankruptcy proceeding was not an execution but the creditors right to issue bankruptcy proceedings was pegged to his right to proceed with an execution. Thus, the court in giving leave to execute may also give leave to proceed with bankruptcy proceedings after a lapse of six years and that power is exercisable pursuant to O 46 and O 92 r 4 of the ROC (see para 34).

[Bahasa Malaysia summary

Responden telah mendapat kebenaran untuk mengemukakan penghakiman terus ('penghakiman tersebut') terhadap perayu di bawah A 26A Kaedah-Kaedah Mahkamah Rendah 1980 pada 11 April 2007. Tidak ada prosiding pelaksanaan yang dilaksanakan terhadap penghakiman tersebut. Responden kemudian mendapat kebenaran untuk melaksanakan penghakiman tersebut pada 2 Oktober 2015 ('perintah pertama kebenaran'). Setelah mendapat perintah pertama kebenaran, responden meneruskan notis kebankrapan berasingan ('BN') dan kemudiannya, petisyen pemiutang terhadap perayu. Perayu kemudian memfailkan permohonan untuk mengetepikan BN dan petisyen pemiutang tetapi permohonan tersebut ditolak oleh penolong kanan pendaftar. Perayu kemudiannya mengemukakan rayuan masing-masing ke Mahkamah Tinggi. Rayuan tersebut sekali lagi ditolak. Tidak berpuas hati, perayu mengemukakan rayuan ke Mahkamah Rayuan di mana rayuan tersebut dibenarkan dan BN diketepikan. Responden seterusnya pada 31 Oktober 2018 memfailkan permohonan baru kebenaran untuk melaksanakan penghakiman dan/atau untuk prosiding kebankrapan terhadap perayu setelah enam tahun menurut A 46 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Hakim mahkamah sesyen yang bijaksana telah membenarkan permohonan kebenaran responden ('perintah

A kedua kebenaran'). Perayu kemudian merayu ke Mahkamah Tinggi terhadap perintah kedua kebenaran tersebut tetapi rayuan mereka ditolak. Dengan itu rayuan ke Mahkamah Rayuan. Perayu berpendapat bahawa perintah kedua kebenaran tidak seharusnya dibenarkan atas dasar bahawa tidak ada pelaksanaan terhadapa penghakiman yang dibuat oleh responden kerana tidak B ada writ pelaksanaan yang dikeluarkan berkaitan dengan penghakiman tersebut berdasarkan A 46 KKM dan bahawa pengeluaran BN bukanlah suatu bentuk pelaksanaan. Isu-isu yang perlu dipertimbangkan adalah: (a) sama ada responden boleh bergantungan kepada perintah pertama kebenaran untuk memulakan prosiding kebankrapan baru; dan (b) sama ada responden telah C gagal untuk mengemukakan sebarang bentuk pelaksanaan terhadap penghakiman dengan cara pelaksanaan yang dirujuk dalam A 46 KKM.

Diputuskan, menolak rayuan tanpa perintah mengenai kos:

D (1) Secara ringkasnya, ianya tidak benar untuk mengatakan bahawa responden tidak mengambil sebarang tindakan setelah perintah pertama diberikan. Sebenarnya percubaan responden untuk melaksanakan penghakiman tidak berjaya. Oleh kerana penghakiman masih sah, responden jelas mempunyai hak untuk melaksanakan penghakiman E tersebut kerana had pelaksanaan masih belum berjalan (lihat perenggan 26).

(2) Setelah penelitian cermat rekod rayuan, mahkamah membuat dapatan bahawa hakim mahkamah sesyen yang bijaksana telah mengguna pakai F budi bicara dengan wajar dan telah dengan tepat membenarkan perintah kedua kebenaran dan Mahkamah Tinggi telah tepat dalam tidak mengganggu penggunaan budi bicara tersebut. Mahkamah mendapati terdapat merit dalam penghujahan responden bahawa responden hanya perlu menunjukkan kepada mahkamah alasan yang cukup dalam G menyokong permohonan tersebut untuk menjelaskan kelewatan prosiding dengan pelaksanaan dan/atau prosiding kebankrapan terhadap perayu. Selagi pemohon kebenaran mengemukakan beberapa alasan yang masuk akal untuk menyokong kebenaran untuk pelaksanaan setelah enam tahun maka kebenaran harus diberikan, lagi pun kesemua H penghakiman tidak akan terbatal melainkan jika ia dilarang had masa (lihat perenggan 30–31).

(3) Ia adalah jelas bahawa meskipun prosiding kebankrapan bukanlah satu pelaksanaan tetapi hak pemiutang untuk memulakan prosiding kebankrapan adalah berlandaskan haknya untuk mengemukakan I pelaksanaan. Oleh itu, mahkamah dalam membenarkan kebenaran pelaksanaan boleh juga memberikan kebenaran untuk memulakan prosiding kebankrapan selepas enam tahun berlalu dan kuasa itu dapat diguna pakai bersesuaian dengan A 46 dan A 92 k 4 KKM (lihat perenggan 34).]

Cases referred to

A Bankruptcy Notice, In re [1898] 1 QB 383, CA (refd)
Affin Bank Bhd v Wan Abdul Rahman bin Wan Ibrahim [2003] 2 MLJ 509, CA (refd)
Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1, FC (folld)

Legislation referred to

Insolvency Act 1967
Insolvency Rules 2017
Rules of Court 2012 O 46, O 46 rr 1, 2(1), 2(3), 3, 3(1)(b), O 92 r 4
Subordinate Courts Rules 1980 O 26A

Amarjeet Singh a/l Mehar Singh (Avtar Singh a/l Prem Singh with him) (Zubeda & Amarjeet) for the appellant.
Shantini Koshy (Yong & Rakan-Rakan) for the respondent.

Ahmad Nasfy JCA:

INTRODUCTION

[1] This appeal revolves around the issue of leave to execute a judgment after a lapse of six years pursuant to O 46 of the Rules of Court 2012 ('the ROC 2012'). The critical question is whether leave which was given for a bankruptcy proceeding will remain valid notwithstanding the bankruptcy proceeding was set aside and secondly whether the said leave could be relied upon to commence fresh bankruptcy proceeding or whether fresh leave must be obtained?

[2] We will address the issues in the paragraphs that follows. First we begin with the facts.

BRIEF FACTS

[3] On 11 April 2007, the respondent obtained leave to sign a summary judgment against the appellant under O 26A of the then Rules of the Subordinate Courts Rules 1980 ('the judgment'). The appellants were adjudged to pay RM109,375.29 with interest and cost.

[4] No execution proceedings were taken on the judgment. The respondent then applied for leave to execute the judgment and leave was accordingly obtained on 2 October 2015 (the first order for leave).

[5] Upon obtaining the first order for leave, on the 6 November 2015 the respondent proceeded with separate bankruptcy notices (first BN) and thereafter the creditor's petitions against the appellants.

[6] Between 15 August 2016 and 22 August 2016 the appellants filed their respective application to set aside the BN and creditor's petitions but they were dismissed by the senior assistant registrar. The appellants then filed their respective appeals to High Court. However, the appeals were dismissed. Dissatisfied, the appellants appealed to the Court of Appeal. At the Court of Appeal, the appellants were successful. In the result the first BN was set aside.

[7] The respondent then on 31 October 2018 proceeded to file a fresh application for leave to execute the judgment and/or for bankruptcy proceedings against the appellants after six years under O 46 and/or O 92 r 4 of the ROC 2012 (the second order for leave). On 29 March 2019 the session judge had allowed the respondent's leave application.

[8] The appellants appealed against the (the second order for leave). The High Court on 13 November 2019 dismissed the appeal. Hence this appeal before us.

THE APPELLANT'S SUBMISSION

[9] The appellants essentially raised three main points in support of this appeal. They are:

(a) that the respondent failed to take any form of execution on the judgment in relation to the mode of execution referred to in O 46 of the ROC 2012 in that there was no filing done by the respondent for a writ of execution to be issued against the appellants;

(b) that since there was no execution, as no writ of execution was issued in relation to the judgment for more than six years, the failure to do so, or delay in doing so, must be explained when seeking leave to execute after six years on the judgment; and

(c) that the second order for leave given on 29 March 2019 that included the order for leave to issue bankruptcy proceedings was wrongly made, as such an order could not be given or made under O 46 of the ROC 2012.

[10] It was submitted by the appellants that there was no execution at all carried out on the judgment for 11 years at the time when the second application for leave to execute was filed on 31 October 2018 despite the respondent having obtained the first order for leave to execute on 2 October

2015. Therefore, the second application for leave to execute cannot be sustained as there was no execution at all. A

[11] Further, the appellant submitted that the provisions of O 46 r 2(1) and O 46 r 2(3) pertains to the issuance of a writ of execution. A writ of execution under O 46 r 1 includes 'a writ of seizure and sale, a writ of possession and a writ of delivery'. In essence, the law is clear that the issuance of a bankruptcy notice is not a form of execution and this law has been correctly stated in *In re A Bankruptcy Notice* [1898] 1 QB 383 by English Court of Appeal, that: B

> The issuing of a bankruptcy notice is clearly not a process of execution upon the judgment. C
>
> It would be impossible to argue that the issue of a bankruptcy notice is a form of execution.

The above case has been referred by the Federal Court in *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1 which ruled that a bankruptcy proceeding was not execution. D

[12] According to the appellant this means that the first order for leave to execute was not carried out by the respondent when it failed to proceed to apply for the issuance of the writ of execution. As a result, it could not be a valid reason for the respondent to file the second application for leave to execute. E

[13] Reliance was placed on the case of *Affin Bank Bhd v Wan Abdul Rahman bin Wan Ibrahim* [2003] 2 MLJ 509 and it was submitted that the respondent in the second application for leave under O 46 r 3(1)(b) of the ROC 2012 failed to state reasons in the affidavit of support of the delay in enforcing the judgment as it is mandatorily required under the ROC. The failure to provide such an explanation is fatal as it could not justify the court invoking the power for making any order or a fresh order for leave to execute the judgment. F G

[14] It is argued that the power of the court under O 46 is one that is limited to granting leave to execute a judgment and includes the process of issuing a writ of execution within the scope and meaning of O 46 and it is not about issuing bankruptcy proceedings which is governed by the Insolvency Act 1967 and Rules made thereunder. H

[15] In the instant case, according to the appellants the respondent had applied for leave for the second time to issue execution and/or bankruptcy proceedings. In other word, the second leave application was also not sustainable as it was not made within the power mandated under O 46 as it has nothing to do with the issuance of bankruptcy proceedings. Thus, the second order for leave ought not to be granted when it involved the issuance of I

bankruptcy proceedings. This makes the second order for leave bad in law and ought to be set aside.

THE RESPONDENT'S SUBMISSION

[16] The respondent's position is that the respondent's fresh/second leave to proceed with execution and/or bankruptcy proceeding under O 46 r 3 and/or O 92 r 4 of the ROC 2012 is proper and it was made and granted in accordance with the ROC.

[17] It was submitted that the respondent had to file the second leave application to execute and/or proceed with bankruptcy proceeding when the first order for leave was no longer valid and ceases to have effect. This is clearly provided under O 46 r 2(3) of the ROC 2012 that if the writ is not issued within one year from the date of the granting such leave, the order shall cease to have effect, without prejudice to making of a fresh order.

[18] In this regard, although the respondent had proceeded on the first leave granted by the sessions court on 2 October 2015 by filing the first bankruptcy notice against both appellant, nevertheless the leave to execute and/or proceed with bankruptcy proceedings were not successful as the first BN were eventually set aside.

[19] The respondent submitted it is incumbent upon it to show the court sufficient reasons in support of the application to explain the delay in proceeding with the execution and/or bankruptcy proceedings against the appellants. As such, the respondent in its affidavit in support of the second leave application at the sessions court had given sufficient reasons for the delay in enforcing the judgment.

[20] It was also submitted that the Court of Appeal on 18 July 2017 had dismissed the appellant's appeal and confirmed that the first order for leave was valid and effective. Therefore, the learned sessions judge after considering the chronology and reasons given by the respondents was satisfied with the same and made the order. That exercise of discretion was made without fault.

[21] The respondent further pointed out that the appellants were aware of the amounts owed as can be seen in their proposal letter to the respondent dated 8 June 2015. Thus, there is no issue of them being led to believe they did not have to pay the respondent and/or are in way prejudiced. As such, the respondent should not be deprived of its fruit of litigation.

[22] With reference to the case of *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1 it was further submitted that in

granting the order for leave under O 46 of the ROC 2012, the court has the power to give leave for the issuance of a bankruptcy notice and is not restricted to giving leave for issuing of a writ of execution only.

[23] Premised on the above, the respondent submits that the learned High Court judge did not err in fact or in law in dismissing the appellant's appeal and affirming the decision of the learned session judge.

FINDING OF COURT

[24] We have given the above submissions our most anxious and careful consideration. With the greatest of respect to the learned counsel, we do not find any merit in the submissions advanced by the appellant. For the reasons that we set out below we find the arguments to be highly misconceived.

[25] It must be stated at the outset that learned counsel was being pedantic when submission was made that no execution was taken until the second leave application was made. Here what learned counsel wanted to emphasis was that no writ of execution was taken. But the fact remained bankruptcy proceeding was taken. That proceedings of course came to a premature end when appellants succeeded on what could be said on technical grounds. It must be mentioned that in all this that the first order for leave despite the same being attached, remains valid. That was conformed by the earlier order of the Court of Appeal.

[26] In short it is not true to say that the respondent had not taken any action upon first order for leave being given. In actual fact the respondent's attempt to execute the judgment was not successful. Since the judgment was still valid, the respondent was obviously entitled to execute the judgment as limitation for execution had not set in.

[27] Much time was devoted by learned counsel to emphasis on the absence of reasons for making the second leave application. Learned counsel was categorical in his submission. With respect we find that to be plainly gross overstatement. The learned High Court judge had dealt with the alleged delay of the execution as follows:

> 28. *Dalam affidavit sokongan tersebut eksh 'A1', saya mendapati terdapat penjelasan bahawa permohonan ini adalah untuk penghakiman bertarikh 11 April 2007 dan telah terakru sebanyak RM226,539.55 setakat 11 April 2013 (selaras dengan K 3(2)(a)). Penjelasan juga diberikan oleh responden berhubung dengan kelewatan memfailkan permohonan kebenaran ini iaitu perlu menyelesaikan rayuan-rayuan yang difailkan oleh perayu-perayu (K 3(2)(c)). Juga terdapat maklumat lain yang dikemukakan seperti permohonan affidavit sokongan dan salinan perintah kebenaran terdahulu selaras dengan Kaedah 3(2)(e) di eksh 'A2' dan 'A3'.*

[28] Further, at para 29 the learned High Court judge concluded as follows:

> 29. *Berdasarkan kepada penemuan ini, saya berpuas hati bahawa responden telah mematuhi peruntukan Aturan 46, KKM 2012 dalam membuat permohonan telah memberikan penjelasan yang munasabah serta menunjukkan keadaan khas dalam penjelasan tersebut dan tidak pernah pada setiap masa material mengabaikan atau mengenepikan haknya untuk meneruskan tindakan pelaksanaan terhadap perayu-perayu. Saya mengguna pakai nas-nas yang dikemukakan perayu-perayu bagi penemuan ini iaitu kes Duer v Frazer* [2001] 1 WLR 919 (QBD); *Patel v Singh* [2002] EWCA Civ 1938 (SC) dan kes *Affin Bank Bhd v Wan Abdul Rahman bin Wan Ibrahim* [2003] 2 MLJ 509 (CA).

[29] Thus the appellant's submissions on the absence of explanation is nothing but a red-herring.

[30] We have carefully scrutinised the appeal record and find that the learned sessions judge had properly exercised the discretion and correctly made the second order for leave and that the High Court was correct in not disturbing the exercise of that discretion.

[31] We found merit in the respondent's submission that the respondent only need to show the court sufficient reasons in support of the application to explain the delay in proceedings with the execution and/or bankruptcy proceedings against the appellants. Here we must emphasise that so long as the applicant for leave provide some plausible reasons in support for leave to execute after a lapse of six years then leave ought to be given, after all a judgment could not be defeated unless it is time barred. We must also state that laches must not apply in the process of execution of a judgment. What we have stated here is plain from a reading of O 46 r 2(3) of the ROC 2012 which provides that the court has the power to give fresh leave if no execution is taken after a lapse of a year after the leave is given. Here we can see that the court's task is to ensure that there must be some reason for the delay.

[32] We shall also address the appellants' contention that under O 46 of the ROC the only leave that could be given is for leave to issue a writ of execution and since the writ of execution is define to exclude bankruptcy proceeding then in so far as the leave purports to give leave to issue bankruptcy proceeding that second order for leave is ineffective and null and void. Further it is to be recalled that learned counsel took pains to bring emphasis the ratio *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* that a bankruptcy proceeding is not a writ of execution.

[33] We find learned counsel appears not to have fully understood the effect of the said decision of the Federal Court. We find the following statements, as summarised by the editors of the Malayan Law Journal, to accurately reflect the

essence of the decision in that case:

(1) *A judgment creditor who commenced bankruptcy proceeding after more than six years had elapsed from the date of the judgment must obtain prior leave of court pursuant to* O 46 r 2 of the ROC. *The BN in the instant case was issued after the judgment was more than six years old. When the BN was issued, the respondent was not in position to execute the judgment without leave of court. Leave should have been obtained. In that it was not obtained, the respondent was not in a position to execute the judgment and therefore was not entitled to issue the BN (see para 62);*

(2) *A bankruptcy proceeding was not execution. But a creditors' right to issue bankruptcy was pegged to his right to proceed to execution. A creditor was not entitled to issue bankruptcy if he was not in a position to issue execution on the judgment at the time the BN was issued. If by reason of the rules of court or on account of some valid legal reason, a creditor was not in a position to issue execution at the time he issued the BN, then the creditor had no right to issue bankruptcy. it was as simple as that (see paras 55–56).*

(3) *Ex parte Woodall was the first and foremost authority to be followed on the meaning of the words execution thereon not having been stayed and the meaning of that phrase should be construed in the context of* s 3(1)(i) of the BA *and not from the perspective of* s 6(3) of the LA. Section 6(3) of the LA *should not be read to nullify* O 46 r 2 of the ROC. Order 46 r 2(1)(a) *was not incompatible with* s 6(3) of the LA *(see para 59).*

(4) *The enunciation by the English courts on the meaning and application of the words execution thereon not having been stayed was eminently relevant as that phrase first appeared in*s 4(1)(g) of the English Bankruptcy Act 1883 *and has remained substantially unchanged in English and Commonwealth bankruptcy legislation from 1883 to the present day. Those words have been construed by English courts not to mean that bankruptcy was a form of execution and therefore had to comply with the rule of court relating to execution, but to mean that a creditor must be in a position, when issuing a BN, to levy immediate execution upon the judgment, should he choose to levy execution* (see paras 16, 23 & 25).

[34] It is our considered view that from the decision above, it is clear that although a bankruptcy proceeding was not an execution but the creditors right to issue bankruptcy proceeding was pegged to his right to proceed with an execution. Thus, the court in giving leave to execute may also give leave for the proceeding with bankruptcy proceeding after a lapse of six years. It is unnecessary for us to state the obvious but for avoidance of doubt that power is exercisable upon a reading of O 46 and O 92 r 4 of the ROC.

CONCLUSION

[35] Based on the forgoing reasons, we dismissed the appellants' appeal. However, given the fact pattern of this case we make no order as to costs.

Appeal dismissed with no order as to costs.

Reported by Rafinie bt Ramli